IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.

BORO HALL CORP.,

Plaintiff-Petitioner,

against

GENERAL MOTORS CORPORATION, GENERAL MOTORS SALES CORPORATION, WILLIAM E. HOLLER, ALFRED P. SLOAN, JR., WILLIAM S. KNUDSEN, DONALDSON BROWN, and JOHN THOMAS SMITH,

Defendants-Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction

The statement of jurisdiction is in the foregoing petition.

Statement of the Case

The facts have been set forth in the foregoing petition.

Summary of Argument

POINT I

THE COURT ERRED IN CONSIDERING THE AFFIDAVIT PRESENTED BY RESPONDENTS ON MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM.

POINT II

THE FACTS ALLEGED IN THE COMPLAINT STATE A CAUSE OF ACTION FOR DAMAGES UNDER THE ANTI-TRUST LAWS.

POINT III

EVEN IF THE AFFIDAVITS ARE ADMISSIBLE A GENUINE ISSUE ON A MATERIAL FACT IS PRESENTED.

POINT I

The Court erred in considering the affidavit presented by respondents on motion to dismiss the complaint for failure to state a claim.

The controversy concerning the "speaking motion to dismiss" has evoked voluminous arguments. It is not feasible within the limits of necessary brevity to enter into an extended discussion of the subject on this application. The decided cases and the texts are listed below.

We submit that a motion to dismiss for insufficiency under Rule 12(b) (6) should be treated the same as was a motion under Equity Rule 29 which was likewise a substitute for the practice on demurrer. In *Polk Company* v. *Glover,* 305 U. S. 5, this Court said at page 9:

> "Defendants' motion to dismiss, like the demurrer for which it is a substitute (Equity Rule 29) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction."

To the same effect is *Gibbs* v. *Buck* (1939), 307 U. S. 66, 76.

The nub of the controversy is well stated in a recent short but able article which appeared in *30 Southern California Law Review,* 92-96 (Availability of a "Speaking Motion" under Federal Rule 12(b) (6); November, 1941, Sparrowe). The writer said:

> "The majority view interprets Rule 12(b) (6) as excluding a consideration thereunder of facts outside the pleading. The adamant minority readily receives affidavits to support the motion. * * * The cases and writers seeking to permit affidavits have generally been silent as to the details of the procedure they sanction and the restrictions to be placed thereon. Rule 56 expressly negates a trial of fact under summary judgment procedure. Rule 12(b) does not contain this restriction, and a judge might permit a 'battle of affidavits'. To allow such a trial would be to deprive a litigant of the valuable rights of cross-examination of witnesses and of jury trial. Suppose also a defendant were to offer oral testimony in support of his motion. There is no rational basis in the minority view by which a distinction could be made to exclude such evidence. Under the majority rule none would be necessary.
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> "Orderly conduct of trials and uniformity of procedure require that the rules adopted by the Supreme Court be applied as they were written. It is not enough to say that it is desirable to treat one motion as though it were another or that the availability of affidavits under one motion makes it 'quibbling' to deny their use elsewhere. Obviously an informed attorney will use Rule 56 when he finds it necessary to submit affidavits and so it is unfortunate that this needless controversy arose. It is essential, however, that affidavits be excluded when offered under Rule 12(b) (6). A Supreme Court decision or an amendment to the Rules will be required to obtain this result in all districts."

The authorities which hold that affidavits are not admissible and may not be considered on a motion to dismiss for failure to state a claim are:

> *Cohen* v. *U. S.* (C. C. A. 8th, Aug., 1942), 129 F. 2d 733, 735 et seq.;

Continental Collieries v. *Shober* (C. C. A. 3rd, Sept., 1942), 130 F. 2d 631, 635-636, points 16-17;

Kentucky-Tennessee Light & Power Co. v. *Nashville Coal Co.* (D. C. Ky., 1941), 37 F. Supp. 728, 736-737, points 10-16; *Hadley* v. *Rinke* (D. C. S. D. N. Y., 1941), 39 F. Supp. 536, 537, points 4-5; *Kuhn* v. *Pacific Mut. Life Ins. Co.* (D. C. S. D. N. Y., 1941), 37 F. Supp. 102, 104-105, points 1-3; *Sheehan* v. *Municipal Light & Power Co.* (D. C. S. D. N. Y., 1940), 1 F. R. D. 256, 257, point 2; *Eberle* v. *Sinclair Prairie Oil Co.* (D. C. Okla., 1940), 35 F. Supp. 296, 299-300, points 7-9, aff'd (C. C. A. 10th, 1941) 120 F. 2d 746, 135 A. L. R. 1494; *Baker* v. *Sisk* (D. C. Okla., 1938), 1 F. R. D. 232, 236, points 11-12; *Sherover* v. *John Wanamaker, etc.* (D. C. S. D. N. Y., 1939), 29 F. Supp. 650, 651, point 1; *Rambo* v. *U. S.* (D. C. N. D. Ga., Dec., 1941), 2 F. R. D. 200, 201, point 3; *Johnson* v. *Johnson & Co.* (D. C. N. D. Ga., 1942), 2 F. R. D. 291, 292, point 4; *Curacao Trading Co.* v. *William Stake & Co.* (D. C. S. D. N. Y., Dec., 1941), 2 F. R. D. 308, point 1; *Dirk Ter Haar* v. *Seaboard Oil Co.* (D. C. S. D. Cal., Dec., 1940), 1 F. R. D. 598; *Munzer* v. *Swedish American Line* (D. C. S. D. N. Y., 1939), 30 F. Supp. 789, 790, point 3; *Holmberg* v. *Hannaford* (D. C. Ohio, 1939), 28 F. Supp. 216, 219, point 3; *Mahoney* v. *Bethlehem Engineering Corp.* (D. C. S. D. N. Y., 1939), 27 F. Supp. 865, 866, point 3; *Sproul* v. *Gambone* (D. C. Pa., 1940), 34 F. Supp. 441, 442, point 1; *Monjar* v. *Stevens* (D. C. N. Y., 1941), 39 F. Supp. 633, 634, point 1; *Grodsky* v. *Sipe* (D. C. Ill., 1940), 30 F. Supp. 656, 660, point 1; *McConville* v. *District of Columbia* (D. C. Dist. Col., Dec., 1938), 26 F. Supp. 295, 296, point 1; *Snowhite* v. *Tide Water Assoc. Oil Co.* (D. S. N. J., July 12, 1941), 5 Fed. Rules Serv., pages 105, 106; *Hughes Federal Practice,* etc. (1940 with 1942 Supp.), Vol. 17, page 434, sec. 20326; *Holtzoff, New Federal Procedure and the Courts,* page 34; *Holtzoff, Practice Under the Federal Rules of Civil Procedure* (1940), 20 Boston U. Law Rev. 179, 202; *Simkins, Fed. Pract.* (1938), page 274, sec. 260; Ib., Sup-

plement 1942, page 25, reference to note 4, page 276; *Edmunds, Cyclopedia of Federal Procedure Forms,* Vol. 1, Supplement 1941, page 89, Rule 12(b); Ib. pages 102-103 (Collating and digesting cases); *Edmunds, Federal Rules of Civil Procedure* (1938), 527; *3 Ohlinger's Federal Practice* (1939), 169; Judge George Donworth, New York Symposium on Federal Rules (1938), *American Bar Association's Federal Rules of Civil Procedure, Proceedings of Institutes, Washington and New York,* 1938, page 302. See also *Polk Company* v. *Glover* (1938), 305 U. S. 5, 9, 59 S. Ct. 15, 83 L. Ed. 6, a per curiam, and *Gibbs* v. *Buck* (1939), 307 U. S. 66, 76, 83 L. Ed. 1111, 59 S. Ct. 725, on this point under the old equity rules; *Redlands Foothill Groves* v. *Jacobs* (D. C. S. D. Cal., 1940), 30 F. Supp. 995, 1007, footnote; *Gatch Wire Goods Co.* v. *W. A. Laidlaw Wire Co.* (C. C. A. 7th, Dec., 1939), 108 F. 2d 433, 436, points 2 and 3.

The best statements of reasons are in *Kentucky-Tennessee Light & Power Co.* v. *Nashville Coal Co., supra* (D. C. Ky., March 13, 1941), 37 F. Supp. 728, 736-737, points 10-16; *Kuhn* v. *Pacific Mut. Life Ins. Co., supra* (D. C. S. D. N. Y., 1941), 37 F. Supp. 102, 104-105, points 1-3; *Eberle* v. *Sinclair Prairie Oil Co.* (D. C. Okla., 1940), 35 F. Supp. 296, 299-300, points 7-9, aff'd (C. C. A. 10th, 1940) 120 F. 2d 746; and the textbooks and law review articles herein cited, especially *Stanley E. Sparrowe, "Availability of A 'Speaking Motion' Under Federal Rule 12(b)(6)"* (November, 1941), 30 So. Cal. Law Review 92-96, quoted hereinabove.

Neutral but valuable discussions are *Pike & Fisher, The "Speaking Demurrer"* (1940), 3 Fed. Rules Serv., Commentary, 12 b. 33, page 674; *Gatch Wire Goods Co.* v. *W. A. Laidlaw Wire Co.* (C. C. A. 7th, Dec. 11, 1939), 108 F. 2d 433, 436, points 2 and 3.

Expressing desire for your Honor's decision are Mr. George Roeming (9 George Washington Law Review 174, 4 Fed. Rules Serv., L. R. 40, page 976) and Judge Church Ford (1940) 1 F. R. D. 321.

The authorities which hold that affidavits may be considered are *Central Mexico Light & Power Co.* v. *Munch* (C. C. A. 2d, Dec. 1940), 116 F. 2d 85, 87, point 1; *Gallup* v. *Caldwell* (C. C. A. 3rd, 1941), 120 F. 2d 90, 92-93, point 1; *Ellis* v. *Stevens* (D. C. Mass., March 3, 1941), 37 F. Supp. 488, 490; *Palmer* v. *Palmer* (D. C. Conn., 1940), 31 F. Supp. 861, 863-864, points 1 and 2, and footnote 1; *U. S. Trust Co.* v. *Sears* (D. C. Conn., 1939), 29 F. Supp. 643, 645, point 2, footnote; *Alabama Independent Service Station Ass'n* v. *Shell Petroleum Co.* (D. C. Ala., 1939), 28 F. Supp. 386, 388-389, points 2; *Massaro* v. *Fisk Rubber Corp.* (D. C. Mass., January 10, 1941), 36 F. Supp. 382; *Calhoun* v. *Lange* (D. C. Md., 1941), 40 F. Supp. 264, 266, point 3; *1 Moore's Fed. Pract.*, pages 645-647, sec. 12.04, especially page 647, note 10, and 1941 Supplement pages 182-184, where authorities pro and con are collated; Dobie, *The Federal Rules of Civil Procedure* (1939), 25 Va. Law Review 261, 266; *Pike, Objections to Pleadings Under the New Federal Rules, etc.* (1937), 47 Yale L. J. 50, 1 Fed. Rules Serv., L. R. 6, page 765; *Roeming, Speaking Motions Under New Federal Rule 12(b)(6)* (1940), 9 George Washington Law Review 174, 4 Federal Rules Serv., L. R. 40, page 972; Judge Charles E. Clark, Washington Institute On Federal Rules (1938), *American Bar Association's Federal Rules of Civil Procedure, Proceedings of Institutes, Washington and New York,* 1938, pages 74-75.

POINT II

The facts alleged in the complaint state a cause of action for damages under the Anti-Trust Laws.

The divergence of opinion in the Circuit Court of Appeals arose on the question of reasonableness of the restraint.

The majority said (R. 143-144; 124 F. 2d 823):

> "We think the effect of the proof is that General Motors Sales Corporation required no more than that

> the location of a used car depot should be fixed by agreement at such a place as would not unduly prejudice other dealers who did business with the seller. We do not regard this as an unreasonable interference with competition or an unfair arrangement between the plaintiff and General Motors Sales Corporation. The latter had the right under its contract to discontinue dealings with the plaintiff on 30 days' notice. Under such circumstances we can see no reason why it should not be allowed to fix a location for the sale of used cars at a place that did not unduly affect other dealers."

Judge Frank, however, thought that this question should be determined at a trial (124 F. 2d 824; R. 145).

If the complaint be tested as a pleading, and if the allegations are, for the purpose of the motion, to be taken as true and the pleader given the benefit of the reasonable intendment inferrable from the allegations, there should be little doubt that a cause of action is alleged. The essential allegations show—

(1) Plaintiff was a dealer in new and *used* automobiles;

(2) Defendants were manufacturers and sellers of *new* automobiles;

(3) Plaintiff, under a contract with the defendants, was entitled to sell *new* automobiles manufactured by the defendants in an area which comprised the entire State of New York and a portion of the State of New Jersey;

(4) Defendants were financially interested in concerns which competed with the plaintiff in the sale of automobiles to the public;

(5) Defendants, who had no direct interest in the *used* automobiles which the plaintiff sold, threatened to cancel the contract for *new* automobiles, unless plaintiff refrained from opening a used car salesroom outside an arbitrary zone, narrower than its selling zone;

(6) This action was taken by the defendants for the purpose of preventing the plaintiff from competing with other automobile dealers, including those concerns in which the defendants had an interest;

(7) The effect of this restriction was to destroy the plaintiff's ability to sell used cars, which in turn prevented it from buying and selling new cars and thereby restrained trade.

It may be that upon a trial and after "close scrutiny" of the facts of this case (*Sugar Institute* v. *U. S.*, 297 U. S. 553, at 600), the jury or other trier of the facts will come to the conclusion that the practice of controlling the location from which used cars are to be sold was entirely reasonable, and that the control was reasonably exercised in the present case. The jury may, however, well conclude that the practice was wholly unreasonable, or if reasonable generally, was unreasonably exercised in the present case, if for no other reason than because respondents had a financial interest in other concerns which competed in the retail trade with petitioner.

The majority in the Circuit Court said that "Chase, the regional manager, was not shown to have made any unreasonable demands" (R. 144; 124 F. 2d 823). The very fact that the defendants, in the guise of regulating the sale of new automobiles, purported to go beyond the contract and sought to restrict the manner of selling used automobiles, is *prima facie* evidence of an undue restriction in trade.

This Court in *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 436 at 456 said:

> "He (the holder of a patent) may not, by virtue of his patent, condition his license so as to tie to the use of the patented device or process the use of other devices or processes or materials which lie outside of the monopoly of the patent licensed."

Certainly a seller of new automobiles has no greater right than the holder of a patent to tie to the sale of his new automobiles the sale of used automobiles in which he has no interest.

In *United States* v. *General Motors Corporation* (C. C. A. 7th, May 1, 1941), 121 F. 2d 376, 393, the Court sustained the verdict of the jury which had found the General Motors Corporation guilty of violation of the Anti-Trust laws because it required dealers to finance the sale of new cars through its financing subsidiary. The Court further held that the joint action of the parent and subsidiary constituted a combination within the meaning of the statute. The restraint herein effected on the sale of used cars is, we submit, more unreasonable than that which was held illegal in *United States* v. *General Motors Corporation.*

Since there is a restraint, presumptively unreasonable, the only other question is its effect on interstate commerce. From the allegation that the petitioner was authorized to sell new cars both in New York and in New Jersey, it is not an unreasonable inference that a restriction upon its activities would affect commerce between the States.

Perhaps the allegations concerning interstate commerce should have been more clearly stated in the complaint. Nevertheless, they are sufficient to give notice of the claim. An error of this character should not be fatal and should at most result in a requirement that the complaint be amended by amplifying these allegations or by making them more definite and certain.

POINT III

Even if the affidavits are admissible a genuine issue on a material fact is presented.

We have been able to find no case in this Court which bears directly on the question whether the reasonableness of the restraint is a question of fact, or may be decided solely as a question of law. As we have said above, the language of this Court in *Sugar Institute* v. *United States*, 297 U. S. 553, 600, would seem to indicate that the question is one of fact or at least one of mixed law and fact.

In *U. S.* v. *Whiting* (D. C. Mass., 1914), 212 Fed. 466, 474, point 4), the Court held that the reasonableness of a restraint was a question to be determined by a jury. The language of the Court in *U. S.* v. *General Motors Corp.*, 121 F. (2d) 376, 399, would indicate the same rule.

See also *Continental Candy Corp.* v. *California etc. Refining Co.*, 270 Fed. 302, 305, point 2 et seq., affirmed in *Fosburgh* v. *California etc. Refining Co.* (C. C. A. 9th, 1923), 291 Fed. 29, 32-37; *Weathers* v. *Jarvis* (1936), 294 Mass. 227, 228-229, 200 N. E. 886, 887; *Berg* v. *Plitt* (1940), 178 Md. 155, 166, 12 Atl. 2d 609; *Kiser Co.* v. *Padrick* (1923), 30 Ga. App. 642, 649, 118 S. E. 791.

There are in the case at bar a number of factual elements which must enter into the reasonableness of the restraint. Apart from the attempt of the respondents to tie used car dealings to dealings in new cars, the financial interest which the respondents are alleged to have in dealer concerns which competed with the petitioner in the New York Zone cannot be lightly overlooked. The respondents, in their letters submitted with the affidavit, expressed the necessity of preventing "undue prejudice" to other dealers. That in itself presents a controversial issue of fact. There is the question whether respondents acted reasonably in arrogating to themselves the right to be the

final judges to determine whether the maintenance of a *used* car outlet by the petitioner at a given location would "unduly" prejudice another dealer. We respectfully submit that questions of this character can be resolved only at a trial with a full opportunity of cross examination and with a complete development of all the material facts.

Conclusion

We respectfully pray that the petition for certiorari be granted.

Respectfully submitted,

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